Filed 6/28/19 P. v. Torres CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SANTIAGO HERNANDEZ TORRES, Defendant and Appellant.	H045883 (Santa Clara County Super. Ct. No. B1475023)

I. INTRODUCTION

Defendant Santiago Hernandez Torres appeals after a jury found him guilty of two counts of aggravated sexual assault of a child under the age of 14 and 10 or more years younger than defendant (Pen. Code, § 269; counts 1-2)[1] and two counts of committing a lewd or lascivious act on a child under the age of 14 (§ 288, subd. (a); counts 3-4). The trial court sentenced defendant to 38 years to life.

Defendant contends there is insufficient evidence of force, duress, or fear to sustain his conviction of aggravated sexual assault of a child as charged in count 2. For reasons that we will explain, we will affirm the judgment.

[1] All further statutory references are to the Penal Code unless otherwise specified.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Prosecution Evidence*

Defendant was a friend of Karina Doe's family and he was her brother's godfather. When Karina was around eight years old, in 2004, defendant and his family were Karina's neighbors in Mountain View. Karina's mother "put th[e] . . . idea in [her] head that they were family."

Defendant's wife babysat Karina and her brother at defendant's apartment during the week while Karina's mother was at work. Sometimes defendant and his kids would be there. There were also times when Karina spent the night so that she could have a sleepover with defendant's daughter, Odalis.

When Karina was around seven years old, in June 2003, defendant got in bed with Karina and Odalis while they watched Dora the Explorer. They were under the covers, and defendant was between the two girls. At some point, defendant grabbed Karina's hand and placed it on his penis over his clothing. Defendant took Karina's hand and rubbed it up and down his penis for about 30 seconds to a minute. Karina felt defendant get an erection. Defendant told Karina not to tell anyone.

When Karina was eight years old and defendant had moved to a different location in Mountain View, Karina and her brother spent the night at his house. Karina was asleep when defendant woke her up and began licking and biting her ear, which made her very uncomfortable and scared. Defendant asked Karina if she liked it, and Karina said "no" at first but then said "yes" when defendant continued to ask. Defendant eventually left.

Every time Karina slept over at defendant's house after that, she was woken up by defendant putting his tongue in her ear and asking her if she liked it. It happened "[p]robably more than 20 to 30 times." Karina once told defendant to stop, but he did not. Karina was scared and did not understand what was happening. Karina did not tell her mom because she was scared of defendant doing something to her family. She was

also concerned that no one would believe her. She was little and did not know what to do or who to tell.

Another time when Karina was eight years old, defendant made her play hide-and-go-seek. Defendant found Karina hiding in his bedroom closet. Karina somehow wound up on defendant's bed.[2] Defendant tried to kiss her, but Karina moved so he ended up kissing her cheek. Defendant then took off Karina's pants and his underwear. Karina was on her back and defendant was on top of her. She felt something enter her vagina for about a minute that caused her deep vaginal pain. Karina did not understand what was going on but she felt scared because she was in pain. Karina told defendant to stop and he did. Karina did not tell anyone because she was scared and in pain and did not know if anyone would believe her.

Around the same time, also when Karina was eight and she was playing hide-and-go-seek with defendant, she ended up on defendant's bed again.[3] They were alone in the bedroom. Defendant "did the same thing, but he used his fingers instead of his penis." Defendant took Karina's jeans off and she felt something like fingers enter her vagina. Karina could see defendant's hand by her vagina. It was "less pain" than when his penis was in her vagina. It lasted for about 30 seconds and then defendant stopped and walked away.

During this time period, whenever Karina was at defendant's house for sleepovers and was sleeping on the sofa bed in the living room, defendant would lick her ears and ask her if she liked it. Defendant would also touch her at least twice a week. He would touch her butt or try to kiss her.

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[2] Karina could not remember how she got on the bed when she testified at trial in 2018.

[3] Karina could not remember how she got on the bed when she testified at trial in 2018.

The conduct stopped when Karina was 10 or 11 years old and her family moved. Once though, when Karina was approximately 13 or 14 years old and was at defendant's new place in Sunnyvale, defendant tried to touch her butt. Karina pushed him off of her and stayed away from him because by then she knew the conduct "was not right."

Karina disclosed the abuse to a nurse when she was hospitalized for depression in May 2014.

Mountain View Police Detective Jessica Nanez interviewed defendant in July 2014. Defendant stated that when they were playing, Karina would bite him and he would bite her ear. Detective Nanez told defendant that Karina said he tried to put his penis in her vagina. Defendant responded, "No. [M]aybe—maybe . . . like I tell you. [¶] . . . [¶] I would get on top—or she would get on top." Defendant said they were just playing and denied that he "did that to her." When asked if he ever put Karina's hand on his penis, defendant stated that Karina would grab him when they were "play wrestl[ing]." Defendant said that if Karina's hand had ever been on his penis, it happened once or twice and it was unintentional. Defendant said that once when they were playing, Karina grabbed his penis over his clothes for two to three minutes and pulled down his zipper. The detective asked defendant if he liked it, and defendant responded, "No, well I – well yes. I felt . . . the type of – emotions and all that . . . ."

Detective Nanez interviewed defendant again after his arrest on January 11, 2015. Defendant told the detective that Karina would touch his penis over his clothes and that he liked the sensation but he knew it was wrong. He also said that Karina liked to get on top of him. Defendant denied ever having sex with Karina.

Dr. Blake Carmichael testified as an expert on Child Sexual Assault Accommodation Syndrome (CSAAS). Dr. Carmichael stated that CSAAS was developed as an educational tool to dispel misconceptions about how sexually abused children behave. Dr. Carmichael described the five characteristics of CSAAS: secrecy, helplessness, entrapment or accommodation, delayed and unconvincing disclosure, and

retraction or recanting. Dr. Carmichael stated that not all five characteristics are present in every instance of abuse.

The parties stipulated that defendant's date of birth was April 30, 1964. Karina's date of birth was June 13, 1996.

B. *Defense Evidence*

Defendant called his son, daughter, and a coworker as witnesses but did not testify on his own behalf.

Defendant's son, Gerardo Torres Castillo, testified that Karina was defendant's goddaughter and that his mother, Theresa Castillo, sometimes babysat Karina and her younger brother. Between 2004 and 2006, defendant was not home when Gerardo got out of school because defendant worked until nighttime. Defendant never came home during the day. Sometimes Gerardo saw defendant playing with Karina, her younger brother, and his sister. It was normal playing, with kids running around and jumping on top of each other and play fighting. When Karina slept over, she slept in a bunk bed with his sister.

Defendant's daughter, Odalis Melissa Torres Castillo, testified that she was best friends with Karina in 2004. Sometimes Karina was at Odalis's house after school because Odalis's mom babysat her. Karina also spent the night sometimes. Defendant was not home when the kids got out of school; he generally came home around 6:00 or 7:00 p.m. When Karina spent the night, she slept with Odalis on the top bunk of a bunk bed in the living room. Karina slept on the side of the bed next to the wall. Odalis never noticed defendant approach the kids in the bunk bed. Sometimes defendant played with them on Sundays when he was home. They wrestled and played hide-and-go-seek.

Dean Hassapakis testified that he was a landscape contractor and had worked with defendant since 1999 or 2000. From 2004 through 2006, they normally worked from 8:00 a.m. until 5:00 or 6:00 p.m., Monday through Friday and some Saturdays. Sometimes they worked until 7:00 or 8:00 p.m. They worked onsite together all day.

C. *Charges, Convictions, and Sentence*

On December 17, 2016, defendant was charged with aggravated sexual assault by forcible rape of a child under the age of 14 and 10 or more years younger than defendant (§ 269; count 1); aggravated sexual assault by forcible sexual penetration of a child under the age of 14 and 10 or more years younger than defendant (§ 269; count 2); and continuous sexual abuse of a child under the age of 14 (§ 288.5, subd. (a); count 3). During trial, the trial court granted the prosecution's motion to amend count 3 to committing a lewd or lascivious act on a child under the age of 14 and to add another count alleging the same offense (§ 288, subd. (a); counts 3-4).

On January 26, 2018, a jury convicted defendant of the four counts. The trial court imposed consecutive sentences of 15 years to life on counts 1 and 2, a consecutive six-year sentence on count 3, and a consecutive two-year sentence on count 4, for a total aggregate term of 38 years to life.

III. DISCUSSION

Defendant contends there is insufficient evidence to support his conviction on count 2 for aggravated sexual assault by forcible sexual penetration of a child under the age of 14 and 10 or more years younger than defendant. Defendant argues that the prosecution presented no evidence that he digitally penetrated Karina by the use of force, duress, or fear and that this court should therefore reduce the conviction to the lesser included offense of sexual penetration of a child under the age of 14 and 10 years younger than defendant in violation of section 289, subdivision (j). The Attorney General counters that there is substantial evidence in the record that defendant used force, duress, and fear in the commission of the offense.

A. *Standard of Review*

The standard of review for an appellate challenge to the sufficiency of the evidence to support a conviction is well established. "The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must 'review the whole

record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) " ' "[T]he appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' [Citations.]" (*People v. Moon* (2005) 37 Cal.4th 1, 22.)

B. *Analysis*

At the time of defendant's offense in 2004, section 269 provided in relevant part: "Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] . . . [¶] (5) A violation of subdivision (a) of Section 289." (Former § 269, subd. (a)(5), added by Stats. 1994, ch. 48, § 1.) Section 289, subdivision (a) stated in relevant part: "Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison . . . ." (Former § 289, subd. (a)(1), added by Stats. 2002, ch. 302, § 5.) For the reasons we state below, we conclude that there is substantial evidence in the record that defendant used both force and duress in the commission of the offense.[4]

1. Force

The definition of the term "force" in the forcible sexual penetration statute is based on the definition of "force" that was established by the California Supreme Court in *People v. Griffin* (2004) 33 Cal.4th 1015 (*Griffin*) for the forcible rape statute. (*In re Asencio* (2008) 166 Cal.App.4th 1195, 1205 (*Asencio*).) "[F]orcible sexual penetration

[4] Because we conclude that there is substantial evidence of force and duress, we do not determine whether there is substantial evidence of fear.

within the meaning of section 289, subdivision (a)(1) is proven when the jury finds beyond a reasonable doubt that the defendant accomplished an act of sexual penetration by the use of force sufficient to overcome the victim's will. [Citations.]" (*Id*. at p. 1205.)

The current version of the forcible sexual penetration statute, section 289, subdivision (a)(1), and the version of the statute in effect at the time of defendant's offense, former section 289, subdivision (a), both provide that the offense may be proven by a showing that the sexual penetration was accomplished by force. We therefore determine that the definition of "force" established in *Asencio* for section 289, subdivision (a)(1), is equally applicable to the term "force" in former section 289, subdivision (a).

" 'Force' includes circumstances where the victim did not want to engage in the act and the evidence does not otherwise establish the victim's positive cooperation in act or attitude. [Citation.] It also includes the force used to accomplish 'the penetration and the physical movement and positioning of [the victim's] body in accomplishing the act.' [Citation.]" (*People v. Thomas* (2017) 15 Cal.App.5th 1063, 1071.) "The question for the jury . . . was whether defendant used force to accomplish [the sexual penetration of the victim] against her will, not whether the force he used overcame [the victim's] physical strength or ability to resist him." (*Griffin, supra*, 33 Cal.4th at p. 1028.) To determine the sufficiency of the evidence, "the reviewing court . . . looks to the circumstances of the case," including the history of sexual abuse, the ages of the perpetrator and the victim, and the nature of their relationship. (*Id.* at pp. 1028-1029.)

Regarding count 2, Karina testified that she was eight years old and was playing hide-and-go-seek with defendant when she ended up on her back on defendant's bed. They were alone in his bedroom, and defendant took Karina's jeans off and put his fingers in her vagina. Importantly, Karina testified that defendant "did the same thing" he had done when he raped her, but he used his fingers instead of his penis. When describing the rape, Karina testified that she was on her back on the bed and defendant

was on top of her. From this testimony, the jury could reasonably infer that defendant was on top of Karina when he digitally penetrated her.

Defendant was a family friend and the godfather of Karina's brother. Karina was at defendant's apartment "[e]very day," Monday through Friday, and sometimes on the weekends, while her mother was at work. Karina's mother "put th[e] . . . idea in [her] head that they were family."

Defendant began sexually abusing Karina when she was around seven years old and he was approximately 39 years old. During the first incident of abuse, when defendant placed Karina's hand on his penis over his clothing, he told Karina not to tell anyone. When Karina was eight years old, defendant woke her up and began licking and biting her ear. Karina testified that this made her very uncomfortable and scared. Defendant asked Karina if she liked it and Karina said "no," but defendant continued. After that, every time Karina slept over, she was woken up by defendant putting his tongue in her ear and asking her if she liked it. Karina was scared and did not understand what was happening.

Based on this evidence, a reasonable jury could determine that defendant used force to overcome Karina's will when he committed count 2. By the time of the offense, defendant had already begun molesting Karina and had told her not to tell anyone about it. He routinely woke her up at night to lick and bite her ear, and continued to do so after Karina initially told him that she did not like it. Defendant was much older than Karina, was considered a family friend, and was her brother's godfather. In this context, we determine that defendant's acts of taking off Karina's pants and laying on top of her when he digitally penetrated her constituted substantial evidence of the requisite force necessary for the offense. (See *Asencio, supra,* 166 Cal.App.4th at p. 1205 [concluding there was sufficient evidence of forcible sexual penetration based on the adult defendant's pulling down the six-year-old victim's underwear, rolling over onto her, and digitally penetrating her]; *People v. Young* (1987) 190 Cal.App.3d 248, 258 [determining

there was sufficient evidence of force through testimony that the defendant called the child over to the bed, sat her on top of him, pulled her pants down, and digitally penetrated and raped her].) Thus, we conclude there is sufficient evidence of force to sustain the conviction on count 2.

2. Duress

Even if we were to conclude there was not substantial evidence of force, however, we would determine there was substantial evidence that defendant accomplished count 2 by means of duress.

The term " 'duress' " as it is used in the sexual offenses of aggravated sexual assault of a child in violation of section 269 means " 'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' [Citation.]" (*People v. Leal* (2004) 33 Cal.4th 999, 1004-1005, italics omitted.)

" '[D]uress involves psychological coercion. [Citation.] Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. [Citations.] "Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim" [are] relevant to the existence of duress. [Citation.]' [Citation.]" (*People v. Veale* (2008) 160 Cal.App.4th 40, 49 (*Veale*).) " 'Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family.' [Citations.]" (*Id.* at p. 46.)

Notwithstanding victim testimony that no explicit threats were involved, it has been held that sufficient evidence of duress existed through implied threats where the victim was eight years old at the time of the offenses because at that age children "commonly view[] [adults] as authority figures" and "[t]he disparity in physical size

between an eight-year-old and an adult also contributes to a youngster's sense of his [or her] relative physical vulnerability." (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 51 (*Pitmon*), disapproved of on another ground by *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12 (*Soto*).) Furthermore, "when the victim is as young as [nine years old] and is molested by her father in the family home, in all but the rarest cases duress will be present." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 16, fn. 6, disapproved of on another ground by *Soto*, *supra*, at p. 248, fn. 12.)

In *Veale*, the Court of Appeal concluded there was sufficient evidence of duress despite the fact that the "defendant did not threaten [the victim] or use physical force when he committed the charged offenses. [The victim had] also testified that when defendant asked her to put his penis in her mouth and, on another occasion, asked her to touch his penis, she got mad and threw clothes around the room. Defendant relented and did not make the same requests again." (*Veale*, *supra*, 160 Cal.App.4th at p. 46.) However, the victim "was seven years old at the time of the molestation. When defendant molested [the victim], she was normally alone with defendant in his or [her own] bedroom. On at least one occasion, the bedroom door was locked. And, as [the victim's] stepfather, defendant was an authority figure in the household. In addition, [the victim] feared defendant and feared that if she told anyone defendant was molesting her, defendant would kill her or mother." (*Id.* at pp. 46-47.) The court determined that "[a] reasonable inference could be made that defendant made an implied threat sufficient to support a finding of duress, based on evidence that [the victim] feared defendant and was afraid that if she told anyone about the molestation, defendant would harm or kill [her], her mother or someone else. Additional factors supporting a finding of duress include[d] [the victim's] young age when she was molested; the disparity between [the victim's] and defendant's age and size; and defendant's position of authority in the family. The totality of this evidence is sufficient to support a finding that defendant molested [the victim] by means of duress . . . ." (*Id.* at p. 47.)

Here, as we stated above, when count 2 was committed, Karina was approximately eight years old and defendant was approximately 39. Their age difference alone would have made defendant an authority figure to Karina (see *Pitmon, supra*, 170 Cal.App.3d at p. 51), but he was also someone whom Karina's mother considered family and he was Karina's brother's godfather. In addition, there would have been a disparity in their physical sizes that would have contributed to Karina's sense of vulnerability. (See *ibid.*)

The abuse started when Karina was seven years old and was ongoing. Defendant perpetrated the abuse in his home, a place where Karina went every weekday. Defendant touched Karina's butt or tried to kiss her at least twice a week and would lick her ears whenever she slept over.

Karina repeatedly testified that when the abuse occurred, she was scared. Defendant told her at least once not to tell anyone about it. Karina testified that she did not tell her mother about the abuse because she was scared defendant would do something to her family. She was also concerned that no one would believe her. Defendant perpetrated count 2 when they were alone in his bedroom.

Based on this evidence, we determine that a rational jury could infer from the totality of the circumstances that defendant's actions constituted an implied threat of force, violence, danger, hardship or retribution that prompted Karina to acquiesce in the sexual act against her will. (See *Veale, supra*, 160 Cal.App.4th at pp. 46-47.)

For all of these reasons, we conclude there is sufficient evidence of duress in the record to support defendant's conviction of section 269 in count 2.

IV. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

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